IN RE RAMASWREE DURAISAMY; EX P HONG LEONG BANK BHD

HIGH COURT MALAYA, SHAH ALAM
SURAYA OTHMAN J
[BANKRUPTCY NOTICE NO: 29NCC-2181-03-2014]
22 MARCH 2015

BANKRUPTCY: *Receiving and adjudication order – Appeal against – Failure to provide judgment debtor with opportunity to be heard – Whether there was a breach of fundamental rules of natural justice – Failure by judgment creditor to mitigate losses – Whether judgment creditor's action or inaction caused judgment debtor to suffer prejudice, injustice and unreasonable burden*

The judgment debtor ('JD') was the guarantor for the borrower who had obtained a loan from the judgment creditor ('JC'), Hong Leong Bank Bhd. The JC obtained judgment against the JD upon the borrower's failure to settle the loan sum. The bankruptcy notice ('BN') and creditor's petition were issued and served on the JD and the court had given the JD one and a half month to settle the amount owed to the JC or to appoint solicitors to object to the bankruptcy proceedings. During the one and a half months, the JD had taken numerous steps to negotiate with the respondent bank and a few proposals of settlement had been made to the bank but to no avail. The JD subsequently appointed a solicitor to act on her behalf and a notice of appointment of solicitor was filed in the court a day before the hearing of the petition. On the hearing of the creditor's petition, counsel for the JD requested for a short postponement from the Senior Assistant Registrar ('SAR') to file the application to set aside the BN in the same week. However, the SAR disallowed the request and proceeded to declare the JD a bankrupt. Hence, the appeal by the JD against the decision of the SAR.

Held (allowing JD's appeal with no order as to costs):

(1) Adjournment is an absolute discretion of the court. The SAR ought to have allowed a short adjournment for the JD's solicitor to peruse the cause papers and file the necessary since the solicitor had only been appointed a day before the hearing. The delay occasioned by the JD could be compensated by an award of appropriate costs. The JD's right to be heard should not be deprived by not giving her an opportunity to be heard. Thus, the SAR's decision in granting the adjudication order and receiving order ('AORO') against the JD without giving her the opportunity to be heard was clearly in breach of the fundamental rules of natural justice. (paras 7, 9 & 10)

(2) There was ample time for the JC to repossess and resell the car. The car was not repossessed more than six years after judgment was obtained and after the AORO was granted by the SAR. The inordinate and contumelious delay by the JC had caused prejudice, injustice and

unreasonable burden to the JD due to the accumulated interest. The JD should not be made to bear the burden for the JC's indolence. (paras 13 & 14)

(3) The JC had the duty to mitigate and they must show that they had made an effort to do so. They must show that they had been prudent in the measures they adopted for the disposal of the car to mitigate the losses that the JD had to bear. The duty arose from the time the breach by the borrower occurred. (para 15)

(4) The JC would have been entitled to claim for the balance outstanding after the car was auctioned off and not wait for more than six years to file bankruptcy proceedings and only then made an effort to repossess the car after the AORO was granted by the court. The inertia or indolence on the part of the JC which led to the JD being punished with high interest should not be tolerated since it was unfair and prejudicial against the JD. (para 16)

Case(s) referred to:

Credit Corp (M) Bhd v. Bulan Sabit Sdn Bhd & Ors [1989] 1 CLJ 912; [1989] 1 CLJ (Rep) 444 HC ***(refd)***

Go Pak Hoong Tractor and Building Construction v. Syarikat Pasir Perdana [1981] 1 LNS 184 FC ***(refd)***

Hamidah Abd Hamid & Anor v. Polynesia Offshore Supplies (B) Bhd [1990] 1 LNS 45 CA ***(refd)***

Hup San Timber Trading Co Sdn Bhd v. Tan Ah Lan [1978] 1 LNS 66 FC ***(refd)***

Mohd Toufic Ozeir v. Desa Hatchery Sdn Bhd [2014] 8 CLJ 1019 CA ***(refd)***

For the appellant/judgment debtor - K Revathi; M/s Zuraida Rajes Vijayan

For the respondent/judgment creditor - Ravindara Kumar; M/s Gulam & Wong

[Editor's Note: On 12 May 2015, the Court of Appeal in Civil Appeal No. B-03(1M)(NCC)-10-02/2015 allowed the appeal by Hong Leong Bank Berhad and overruled the decision of the High Court.]

Reported by S Barathi

JUDGMENT

Suraya Othman J:

Introduction

[1] This is an appeal by the judgment debtor ("JD") against the decision of the learned Senior Assistant Registrar ("SAR") in granting the adjudication order and receiving order ("AORO") on 28 October 2014. The creditors petition ("CP") dated 29 June 2014 was fixed for first hearing on 10 September 2014. The CP was served personally on that very same day to the JD. The learned SAR then fixed the second hearing on 28 October 2014. On the second hearing date, 28 October 2014, the SAR granted the AORO in the presence of both parties. Aggrieved, the JD now appeals to this court. For convenience, the appellant will be referred to as "JD" while the respondent bank will be referred to as "JC".

Background Facts

[2] The JD, Ms Ramaswree a/p Duraisamy, a business woman, was a guarantor for the borrower, Mr Sandiranshegran a/l Subramaniam, who had obtained a loan from the JC, Hong Leong Bank Bhd, to purchase a Mercedes Benz car S320, Registration No. BHR 1225.

(i) the JC had obtained judgment against the JD (guarantor) on 14 July 2008 due to the borrower's failure to settle the loan sum.

(ii) bankruptcy notice ("BN") and CP had been issued and served against the JD. The JD has no complaints on the service of both the cause papers.

(iii) the JC had served the CP on the JD during case management in court on 10 September 2014.

(iv) the court had given one and a half month for the JD to settle the amount owed to the JC or to appoint solicitors to object to the bankruptcy proceedings.

(v) the JD had taken steps to settle the amount due by meeting and negotiating with the said bank officers on a proposal for settlement. Negotiations failed to reach any settlement.

(vi) JD then appointed a solicitor on 27 October 2014 and a notice of appointment of solicitors was filed in court on the same day.

(vii) On the hearing of the CP fixed on 28 October 2014, counsel for JD informed the SAR that she was appointed a day before and requested for a short postponement for her to file the application to set aside the BN in the same week. The SAR disallowed the request and proceeded to declare the JD a bankrupt.

Decision Of This Court

[3] The JD was represented by Ms K Revathi while the JC was represented by Mr Ravindara Kumar.

[4] From the records of proceedings, the service of the BN and the CP was proper and this is not disputed by the JD. JD had not filed any application to set aside the BN nor filed any application to oppose the CP. This fact was admitted by the JD.

[5] On the second hearing of the CP on 28 October 2014, it was clear that the cause papers were all in order for the SAR to grant the AORO. From the records of proceeding, the JD had appointed a solicitor on 27 October 2014 and the notice of appointment was filed on 27 October 2014, the same day.

[6] During the hearing of the CP on 28 October 2014, the solicitor for JD had sought an adjournment from the SAR on the basis that she was just appointed a day before and that she would need time to file the application to set aside the BN which she undertook to do in the same week. The SAR

refused to adjourn the matter and proceeded to exercise her judicial discretion to grant the AORO without hearing out the parties.

[7] It is trite law that adjournment is an absolute discretion of the court. This principle was laid down in the case of *Go Pak Hoong Tractor and Building Construction v. Syarikat Pasir Perdana* [1981] 1 LNS 184; [1982] 1 MLJ 77 where the Federal Court held that:

> The granting of an adjournment is in the absolute discretion of the court depending on the facts of each case. Unless it can be shown that the discretion was improperly exercised it should not be disturbed.

[8] In another case of *Hup San Timber Trading Co Sdn Bhd v. Tan Ah Lan* [1978] 1 LNS 66; [1979] 1 MLJ 238, the Federal Court decided as follows:

> ... as the learned trial judge was in some doubt as to the real reason behind the inability of the appellant to attend court, he should have allowed an adjournment to enable both parties to be given an opportunity to be heard. Any delay occasioned by what appeared to be an inadequate reason for absence could be compensated by an award of appropriate costs.

[9] In the present appeal, one and a half months was given to the JD to set aside the BN or to oppose the CP. JD submitted that during that period of time, the JD had taken numerous steps to negotiate with the respondent bank and a few proposals of settlement had been made to the bank but to no avail since the bank wanted a lump sum payment for settlement. The JD later approached a solicitor to act on her behalf for the petition. The notice of appointment of solicitor was filed in court on 27 October 2014. At this point of time, during the hearing of the petition on 28 October 2014, the learned SAR ought to have allowed a short adjournment for the JD's solicitor to peruse the cause papers and filed the necessary since the solicitor was just appointed a day before. The delay occasioned in this case by the JD can be compensated by an award of appropriate cost. The JD's right to be heard should not be deprived by not giving her an opportunity to be heard. This rule of fundamental justice is discussed in the case of *Mohd Toufic Ozeir v. Desa Hatchery Sdn Bhd* [2014] 8 CLJ 1019; [2014] MLJU 680, where it is stated:

> We find that the failure on the part of the learned Deputy Registrar to accord parties the right to be heard before him amounts to a fundamental breach of rules of natural justice. The hearing of the application to set aside the second bankruptcy notice before the learned Deputy Registrar is procedurally flawed as the learned Deputy Registrar should have allowed learned counsel for the judgment debtor to submit orally, despite the fact that parties had filed their written submissions. It is the rule of law that parties in a court proceedings have the right to be heard before a deliberation is made.

[10] Thus, the learned SAR's decision in granting the AORO against the JD

without giving her the opportunity to be heard is clearly in breach of the fundamental rules of natural justice.

[11] Learned counsel for the JD also argued that the JD was a guarantor for the loan obtained *vide* a hire-purchase agreement to purchase a Mercedes Benz car. Learned counsel for JD submitted that the JC failed to repossess the said car and auction the same to recover the defaulted sum. The JD referred to the case of *Hamidah bte Abd Hamid & Anor v. Polynesia Offshore Supplies (B) Bhd* [1990] 1 LNS 45; [1990] 3 MLJ 94 in which the court in that case held that the bankruptcy proceeding is a quasi-penal nature and it is imperative that the procedural requirements are strictly complied with.

[12] The counsel for JD argued that the JC had delayed in filing the BN for more than six years after judgment was pronounced in the Session Court on 14 July 2008. No explanation for the delay was tendered by the JC. It is the submission of learned counsel for JD that the JC had a duty to mitigate upon the judgment pronounced against the JD.

[13] The court was made to understand during the submission of this appeal that the car was not repossessed until 3 November 2014, more than six years after judgment was obtained on 14 July 2008, and that too, after the AORO was granted by the learned SAR on 28 October 2014. The car was first auctioned on 19 December 2014 and was successfully auctioned off on 16 January 2015.

[14] Thus from the facts, there was ample time for the JC to repossess and resell the car. In fact the car could have been repossessed once judgment is obtained on 14 July 2008 and auctioned off soon thereafter. This, the JC failed to do. The court finds that the inordinate and contumelious delay by the JC had caused prejudice, injustice and unreasonable burden to the JD due to the accumulated interest which had ballooned to about RM107,000 and the JD should not be made to bear the burden for the JC's indolence.

[15] The JC has a duty to mitigate and they must show that they had made an effort to do so. They must show that they had been prudent in the measures they adopted for the disposal of the car to mitigate the losses that the JD had to bear. This duty arises from the time the breach by the borrower occurred. This can be seen in the case of *Credit Corp (M) Bhd v. Bulan Sabit Sdn Bhd & Ors* [1989] 1 CLJ 912; [1989] 1 CLJ (Rep) 444 which held that:

> The long delay between the date of repossession and the date of the sale did raise a question as to whether the plaintiffs had been prudent in the measures they adopted for the disposal of the goods. They have a duty to mitigate and they must show that they did so.

[16] The JC would have been entitled to claim for the balance outstanding after the car was auctioned off and not wait for more than six years to file in bankruptcy proceeding and then only made an effort to repossess the car after the AORO was granted by the court. This inertia or indolence on the

A part of the JC which led to the JD being punished with high interest due from 11 January 2008 till to date should not be tolerated by this court since it is unfair and prejudicial against the JD.

Conclusion

B **[17]** This appeal ought to be allowed on the following reasons:

(a) the SAR denied the rights of the JD to be heard although the notice of appointment of solicitors was filed on 27 October 2014 and the JD's counsel had informed the SAR that the application to set aside the BN will be filed on the same week;

C

(b) JC failed to explain and justify the inordinate delay of more than six years for them to file the BN against the JD;

(c) it is unfair and prejudicial against the JD for the JC now to claim all the accrued interest from 11 January 2008 until to date due to the JC's failure in filing the BN at the earliest date after getting judgment against JD on 14 July 2008; and

D

(d) JC has also failed to mitigate the loss and only repossessed the car after the AORO order was granted and auctioned off the same more than six years after judgment against JD was obtained.

E **[18]** Therefore, based on the facts of the case, had the JC acted with alacrity and had repossessed the car much earlier, the JD would not be prejudiced to pay such high interest sum. This court is satisfied that the JD was not given the right to be heard before adjudication of her case by the SAR. The JC too had failed to mitigate the loss which had occasioned injustice to the JD. F In the circumstances, the appeal by the JD from the decision of the learned SAR ought to be allowed with no order as to costs.

Appeal allowed with no order as to costs.

G

H

I